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NO. 82-64

IN THE

Supreme Court of the United States

October Term, 1981

RICHARD JEROME PARMLEY,
Petitioner,

vs.

THE STATE BAR OF CALIFORNIA
and
THE COMMITTEE OF BAR EXAMINERS OF
THE STATE BAR OF CALIFORNIA,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of the State of California

RESPONDENTS' BRIEF IN OPPOSITION

HERBERT M. ROSENTHAL
MAGDALENE Y. O'ROURKE
555 Franklin Street
San Francisco, California 94102
(415) 561-8200

ROBERT M. SWEET
1230 West Third Street
Los Angeles, California 90017
(213) 482-8220

Attorneys for Respondents

QUESTION PRESENTED

Does the California Supreme Court's denial of a petition to review and reverse the decision of the Committee of Bar Examiners of The State Bar of California to refuse to re-read and re-evaluate petitioner's essay answers on the October 1981 First-Year Law Students' Examination, which petitioner failed to pass, constitute a violation of petitioner's due process and equal protection rights guaranteed by the Fourteenth Amendment to the United States Constitution?

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Respondents respectfully request that this Court deny the petition for writ of certiorari, seeking review of the California Supreme Court's orders in

this case filed March 25, 1982 and April 15, 1982. Copies of the orders are attached to the petition for writ of certiorari as appendix 1 and appendix 2, respectively.

COUNTERSTATEMENT OF THE CASE

Petitioner commenced his law studies in September 1978 at Laclede School of Law, an unaccredited law school in the state of Missouri and received the degree of Juris Doctor from that school January 13, 1982. He is not eligible to take the bar examination in the state of Missouri because Laclede is unaccredited.*

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* Pursuant to rule 8.03(a)(2) of the Missouri Supreme Court Rules, "No person shall be eligible to take the bar examination until such person shall have: . . . Graduated with an LL.B. or J.D. degree, or equivalent first degree in law, from a law school approved by the Section of Legal Education and Admissions to the Bar of the American Bar Association."

Students enrolled at Laclede sign a statement to the effect that they have read and understand the following notice which appears in the 1980-1983 Laclede School of Law Bulletin:

> "Laclede School of Law is not accredited by the American Bar Association. No representation is made or implied that graduates of Laclede are eligible to take bar examinations leading to licensing as lawyers. The school is making plans, and exerting reasonable effort, to secure approval for our graduates to take the Missouri Bar. If approval is not granted, graduates will not be able to take the bar examination and consequently will not be able to practice law."

In the fall of 1980 Laclede applied to the Committee of Bar Examiners of The State Bar of California ("Committee") for preliminary approval and provisional accreditation. In keeping with its policy of not considering for California accreditation a school which is not recognized in the state where it is

located, the Committee denied the application.

An unaccredited law school that is located outside the state of California may file for registration with the Committee and if the registration is accepted, persons who study at that school and can meet California standards, and comply with California admissions laws, may seek certification to the California Supreme Court for admission and license to practice law in California. (See rule 957, California Rules of Court, attached as appendix A.)

Laclede filed for registration with the Committee on November 20, 1980. At its June 21, 1981 meeting, the Committee accepted Laclede's registration, nunc pro tunc, as of the beginning of the 1980-1981 school year. Thus, petitioner and other Laclede students became eligible to seek certification for

admission to practice in California.

As a prerequisite to taking the California General Bar Examination and seeking certification for admission, any person who studies law at an unaccredited law school must take and pass the First-Year Law Students' Examination ("FYLSX") after completion of the first year of law study. For purposes of fulfilling admissions requirements, such person is given no credit for the first year of law study until the FYLSX is passed; and no credit is given for law study completed subsequent to the first year and before the FYLSX is passed, unless the Committee decides, for good cause shown in a particular case, that additional credit should be given. (See Cal. Bus. & Prof. Code, § 6060(g), copy attached to Petition for Writ of Certiorari, appendix 3; see also rule VI, § 61,

Rules Regulating Admission to Practice Law in California, copy set forth in Petition for Writ of Certiorari, pp. 2 and 3.)

The FYLSX is given in June and October of each year. An applicant may sit for the examination as many times as desired until it is passed.

Petitioner took and failed to pass the FYLSX in June 1981 and in October 1981. He did not apply to take the June 1982 examination.*

The examinations which petitioner took consisted of four essay and one hundred multiple-choice questions on contracts, torts and criminal law. The maximum score possible on each portion

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* After completing his law studies at Laclede in January 1982, petitioner filed an application to take the February 1982 California General Bar Examination, but was not eligible to sit for that examination because he had not passed the FYLSX.

of the examinations was 400 points, with a total possible score of 800 points. In order to pass either the June 1981 FYLSX or the October 1981 FYLSX, it was necessary to receive a score of 560 points or 70 percent of 800.

Petitioner received a failing score of 494 points on the June 1981 FYLSX and a failing score of 535 points on the October 1981 FYLSX.

If an applicant does not pass the FYLSX but receives a total score of 540 points or more, the applicant's essay answers are automatically reappraised by an independent reappraiser as a routine part of the grading process. Petitioner did not receive a high enough score on either the June 1981 or the October 1981 FYLSX to be eligible for reappraisal of his essay answers.

Examination papers are retained by the Committee for a period of four

months following the release of results. During that time, applicants who fail to pass the examination may inspect their papers at either the Los Angeles or San Francisco office of the Committee. After the four-month period, the papers are destroyed.*

After petitioner failed to pass the October 1981 FYLSX, he informally requested that his essay answers be re-read and re-evaluated by an independent reappraiser. In response to that request, he was informed that it is Committee policy to refuse to entertain requests for reconsideration of grades unless the applicant can show that a departure from established grading procedures or an arithmetical or clerical error caused a failing grade or

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* Because petitioner's examination papers are the subject of litigation, they have not been destroyed.

prevented automatic reappraisal of essay answers.

Subsequently, petitioner filed a formal petition with the Committee alleging that he had, in fact, passed the October 1981 FYLSX but received a failing grade because he lacks the ability to write legibly and his essay answers were not carefully read. He again requested that his essay answers be re-read and re-evaluated by an independent reappraiser. The Committee denied the petition.

On March 10, 1982, petitioner filed a petition in the California Supreme Court, seeking review and reversal of the Committee's decision on constitutional grounds. He attacked the validity of the requirement that applicants from unaccredited law schools must take and pass the FYLSX and alleged that his examination was not properly

read and graded. Petitioner also asked the California Supreme Court to enjoin the Committee from destroying any of the October 1981 FYLSX examination papers until his petition to that court was acted on.

The court below exercises original jurisdiction in considering actions of the Committee of Bar Examiners. It considers the merits of every petition for review filed by unsuccessful applicants. Petitions which are perceived by the court not to involve substantial questions requiring plenary consideration with full briefing on the merits and oral argument, are determined on the basis of preliminary pleadings and issuance of a writ of review is denied by order without opinion. (See Konigsberg v. State Bar of California, 353 U.S. 252, 254-258, 77 S.Ct. 722, 723-726 (1957).) By order filed

March 25, 1982, the petition for review was denied. (See Petition for Writ of Certiorari, appendix 1.)

The California Supreme Court denied a petition for rehearing and an application for stay by order filed April 15, 1982. (See Petition for Writ of Certiorari, appendix 2.)

REASON THE WRIT SHOULD BE DENIED

1. Petitioner's Constitutional Challenges to the Decision Below Are Without Merit

It is well settled that "[a] State can require high standards of qualification, such as good moral character or proficiency in its law, before it admits an applicant to the bar, but any qualification must have a rational connection with the applicant's fitness or capacity to practice law." (Schware v. Board of Bar Examiners of the State of New Mexico, 353 U.S. 232, 239; 77 S.Ct. 752, 756 (1957).)

The FYLSX is an examination which sets a minimal standard of proficiency in contracts, torts and criminal law after one year of study in an unaccredited law school. The standard must be met by all applicants who study law in unaccredited schools.

Petitioner does not assert, nor can

he assert, that there is no rational connection between California's requirement that all applicants from unaccredited schools take and pass the FYLSX, and its ultimate legitimate state purpose that all applicants demonstrate proficiency in the law as a prerequisite to admission.

However, in a strained effort to raise procedural due process issues and support his contention that the decision below is unconstitutional, petitioner attempts to analogize his circumstances to the circumstances of the petitioner in Willner v. Committee on Character and Fitness, etc., 373 U.S. 96; 83 S.Ct. 1175 (1963). There is no basis for such comparison. The petitioner in Willner passed the New York bar examination in 1936 but was refused certification for admission in 1938, following a moral character proceeding. Between 1938 and

1960, he made numerous attempts to find out the basis of the refusal but was not informed of the accusations against him and was not given the opportunity to confront and cross-examine his accusers. He challenged the proceedings on constitutional grounds and this Court held he had been denied procedural due process.

On the other hand, petitioner has twice failed to pass the FYLSX. Thus, he has been unable to meet a lawful, preliminary proficiency prerequisite to eligibility to take the General Bar Examination and certification for admission. He has not availed himself of the opportunity to take the FYLSX a third time.

Even though petitioner did not receive a high enough score on his October 1981 essay answers to come within the range of eligibility for

independent reappraisal and was unable to show that his failing the examination was due to a departure from established grading procedures or an arithmetical or clerical error, he sought special treatment and requested that the Committee grant him an independent reappraisal of his answers. The Committee denied his request and the California Supreme Court upheld the Committee action.

Petitioner now asserts that, on the basis of his suspicions that his essay answers on the October 1981 FYLSX were not properly read and graded, he is entitled to, and the California Supreme Court should have ordered, a full hearing on the matter, replete with a panoply of procedural due process requirements.

The California Supreme Court has consistently applied the following long-standing policy with respect to

complaints of applicants who fail to pass either FYLSX or the General Bar Examination:

> "The attitude of this court is that if any dissatisfied applicant can show that he was denied passage of the state bar examinations through fraud, imposition, or coercion, or that in any other manner he was prevented from a fair opportunity to take the examinations, this court will be willing to listen to his complaint. Inability to pass the examinations, which are successfully passed by other applicants, will, of course, not be inquired into by the court. ... one's general qualifications are not to be substituted for the requisite knowledge of law which one must possess in order to be admitted into the legal profession." (In re Admission to Practice Law, 1 Cal.2d 61, 64 (1934).)

Petitioner seeks exception from the application of this policy to his complaints by contending that by requiring that applicants who study in unaccredited schools take and pass the FYLSX before taking the General Bar

Examination, "California has created an entitlement that should be governed by the same procedural due process protections as spelled out by this Court in Willner." Clearly this contention is a non sequitur.

Petitioner also alleges that the decision below violates his rights to equal protection. He incorrectly states that "[a]n unsuccessful bar applicant can appeal his scores pursuant to the procedural due process rights as articulated in Willner; an unsuccessful FYLSE [sic] applicant can only request an independent reappraisal of his score if it falls between 540 and 560 out of 800." It should be noted that the same policies and rules with respect to reconsideration of grades apply to applicants who take and fail to pass the General Bar Examination as apply to applicants who take and fail to pass the

FYLSX. There is no provision which contemplates routine or automatic "appeal" of scores by applicants who fail the General Bar Examination or the FYLSX. The Committee's policy with respect to reconsideration of grades is stated supra at page 8. The independent reappraisal to which petitioner refers is, however, a routine part of the grading process, automatically applied if an applicant taking either the General Bar Examination or the FYLSX scores within a specified range on an examination.

The fact that an applicant who studies at an unaccredited school is required to take the FYLSX, and an applicant who studies at an accredited school is not required to do so, is a real difference in the treatment of the two sets of applicants in California. However, as pointed out by the

California Supreme Court in Bib'le v. Committee of Bar Examiners, 26 Cal.3d 548, 555 (1980), that difference does not constitute violation of equal protection. The holding in Bib'le was as follows:

> "Recent court decisions have uniformly rejected the claim there is no rational relationship to a legitimate state purpose in rules requiring different treatment in bar admissions depending on the nature or quality of legal education and training received by applicants to the bar. (See Huffman v. Montana Supreme Court (D.Mont. 1974) 372 F.Supp. 1175, affd. (1974) 419 U.S. 955 [42 L.Ed.2d 172, 95 S.Ct. 216]; Goldsmith v. Pringle (D.Colo. 1975) 399 F.Supp. 260.)
>
> "There is no question the FYLSX serves a legitimate state interest. It both protects persons from continuing to pursue a profession for which they are not qualified, and aids qualified persons in judging the quality of the training and education they are receiving in preparation for the bar examination. Not only are these legitimate state interests but there is a rational basis for the different treatment of

> students receiving instruction at accredited and unaccredited schools because the committee, by setting standards for accreditation, can impose minimum standards on the quality of education at accredited schools. Petitioner's equal protection challenge is thus without merit." (Emp. added.)

It is submitted that petitioner's efforts to translate his inability to pass the FYLSX into dimensions of deprivation of due process and equal protection are entirely without merit.

CONCLUSION

Contrary to petitioner's allegations, the orders of the court below did not violate his constitutional rights to due process and equal protection. The petition for a writ of certiorari should, therefore, be denied.

Dated: August 10, 1982

Respectfully submitted,

HERBERT M. ROSENTHAL
MAGDALENE Y. O'ROURKE
555 Franklin Street
San Francisco, CA 94102

ROBERT M. SWEET
1230 West Third Street
Los Angeles, CA 90017

Attorneys for Respondents

Rule 957. Law School Study in Schools Other Than Those Accredited by the Examining Committee*

(a) A person who seeks to be certified to the Supreme Court for admission in and licensed to practice law in accordance with section 6060(e)(3) of the Business and Professions Code shall receive credit for (i) study in a law school other than one accredited by the examining committee established by the board of governors of the State Bar pursuant to section 6046 of said code only if the law school satisfies the requirements of paragraph (b) or paragraph (c) of this rule; or (ii) instruction in law from a correspondence school only if the correspondence school requires 864 hours of preparation and study per year for four years and satisfies the requirements of paragraph (d) of this rule.

(b) A law school in this state that is not accredited by the examining committee, must

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* Adopted by the Supreme Court of California effective Oct. 8, 1975.

(1) be authorized to confer professional degrees by the laws of this state,

(2) maintain a regular course of instruction in law, with a specified curriculum and regularly scheduled class sessions,

(3) require classroom attendance of its students for a minimum of 270 hours a year for at least four years, and further require regular attendance of each student at not less than 80 percent of the regularly scheduled class hours in each course in which such student was enrolled and maintain attendance records adequate to determine each student's compliance with such requirements,

(4) maintain, in a fixed location, physical facilities capable of accommodating the classes scheduled for that location,

(5) have an adequate faculty of instructors in law, provided that the faculty will prima facie be deemed adequate if at least 80 percent of the instruction in

each academic period is by persons who possess one or more of the following qualifications:

(i) admission to the general practice of the law in any jurisdiction in the United States,

(ii) judge of a United States court or a court of record in any jurisdiction in the United States, or

(iii) graduation from a law school accredited by the examining committee,

(6) own and maintain a library consisting of not less than the following sets of books, all of which shall be current and complete:

(i) the published reports of the decisions of California courts, with advance sheets and citator,

(ii) a digest or encyclopedia of California law,

(iii) an annotated set of the California codes,

(iv) a current, standard text or treatise for each course or subject in the curriculum of

the school for which such a text or treatise is available.

(7) establish and maintain standards for academic achievement, advancement in good standing and graduation and provide for periodic testing of all students to determine the quality of their performance in relation to such standards, and

(8) register with the examining committee, and maintain such records (available for inspection by the examining committee) and file with the examining committee such reports, notices and certifications, as may be required by the rules of the examining committee.

(c) A law school outside the state that is not accredited by the examining committee must

(1) be authorized to confer professional degrees by the law of the state in which it is located,

(2) comply with subparagraphs (2), (3), (4), (5), (7), and (8) of paragraph (b) of this rule, and

(3) own and maintain a library that is comparable in content to that specified in subparagraph (6) of paragraph (b) of this rule.

(d) It is the duty of a correspondence law school to register with the examining committee and file such reports, notices and certifications as may be required by the rules of the examining committee concerning any person whose mailing address is in the state of California or whose application to, contract with, or correspondence with or from the law school indicates that the instruction by correspondence is for the purpose or with the intent of qualifying that person for admission to practice law in California.

(e) The examining committee may make such inspection of law schools not accredited by the committee or correspondence schools as may be necessary or proper to effectuate the provisions of section 6060 of the Business and Professions Code and of this rule and of the rules of the examining committee.

(f) This rule shall not apply to any person who, on the effective date of the rule, had commenced the study of law in

a manner authorized by section 6060(e) of the Business and Professions Code and registered as a law student prior to January 1, 1976 (as provided in section 6060(d) of the Business and Professions Code) and otherwise satisfies the requirements of section 6060(e) of the Business and Professions Code; provided that after January 1, 1976 credit shall be given such person for any study in an unaccredited law school or by correspondence only if the school complies with the requirements of paragraph (b)(8) or paragraph (d) of this rule, whichever is applicable, and permits inspection as provided in paragraph (e) of this rule.